

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.7.2019

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.No.2438 of 2018

The Assistant Commissioner of
GST & Central Excise,
Chennai North Commissionerate,
No.121, Nungambakkam High Road,
Chennai 600 034.

..Appellant

Vs.

Shriram Value Services Pvt. Ltd.
No.76, Venkatakrishnan Road,
Raja Annamalaipuram,
Chennai 600 028, Tamil Nadu.

..Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act against the Final Order No.40334 of 2018 dated 18.1.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For appellant : Ms.Aparna Nandakumar
For Respondents : Ms.P.Jayalakshmi for
Mr.S.Muthu Venkataraman

JUDGMENT

(Judgment of the court was made by Dr.VINEET KOTHARI, J.)

The Revenue has filed the present Appeal under Section 35G of the Central Excise Act aggrieved by the order dated 18.1.2018 passed by the learned CESTAT (South Zonal Bench), Chennai allowing the Appeal filed by the Assessee M/s.Shriram Value Services Private Limited and holding that during the relevant period viz., April 2009 to March 2011, the Assessee had the bona fide belief that the trading activity carried out by it was Exempted Services and the Assessee was eligible to avail the CENVAT Credit for the period prior to 1.4.2011 when such trading activity was deemed to be Exempted Services and therefore, the Show Cause Notice issued to the Assessee invoking the extended period of limitation was not justified as the

Assessee had not mala fidely evaded any payment of Duty on such trading activity by availing the CENVAT Credit in respect of input services.

2. The learned counsel for the Appellant-Revenue Ms.Aparna Nandakumar, relying upon the decision of the Gujarat High Court in the case of Commissioner of Central Excise v. Neminath Fabrics Private Limited (2010 (256) ELT 360 (Guj.)), which has been later on followed by a Division Bench of this court in the case of King Bell Apparels v. CCE (C.M.A.No.2859 of 2015 decided on 19.9.2018), submitted that the concept of knowledge of the Department about the alleged payment of duty on the part of the Assessee on the basis of some Audit Report in the past could not be attributed upon the Adjudicating Authority to prohibit him from invoking the extended period of limitation and therefore, the learned Tribunal has erred in giving such benefit to the Assessee in the present case and holding that extended period of limitation could not be invoked by the Revenue Authority.

3. Per contra, the learned counsel for the Assessee relied upon the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise v. Kolety Gum Industries (2016 (335) ELT 581 (SC)) in which the Hon'ble Supreme Court held that the extended period of limitation could not be invoked under Section 11A of the Central Excise Act, 1944 in case at the relevant time there were conflicting judgments of the Tribunal and the action of the Respondent-Assessee in classifying the goods in a particular manner was clearly bona fide, and larger period of limitation would not be available to the Department.

4. We have heard the learned counsel for the Parties.

5. The learned Tribunal, in the order impugned in the present Appeal, has held as under:-

"5. The main contention put forward by the appellant is on the ground of limitation. The period involved is from April 2009 to March 2011 whereas the show cause notices have been issued invoking the extended period of limitation. The ld. counsel for the appellant has submitted that there was conflicting decisions during the relevant period holding that trading activity is an exempted service and is eligible for credit. Indeed, the position prior to 1.4.2011 was doubtful and there were decisions in favour of assessee as well as Revenue. Only after 1.4.2011, the position was settled by adding Explanation to the definition of exempted services which made trading activity to be a deemed exempted service. It is very much clear from the facts of the case that the appellant have been maintaining separate records for the common inputs used in trading and

taxable output service. This itself brings out the bona fide belief of the appellant that they were under the impression that their activity is an exempted service and would be able to avail credit by following the procedures under Rule 6 (2) and (3). Further, they have been filing service tax returns regularly and they have been subjected to periodical audit. Even in CERA audit, the said objection was not raised on the availment of credit on common input services used for trading and taxable outcome service. In such circumstances, the appellant cannot be saddled with intention to evade payment of service tax. There is no other evidence brought out by the department to conclude that the appellant is guilty of suppression of facts with intent to evade payment of service tax so as to invoke extended period of limitation. We therefore conclude that the show cause notice is time-barred.

6. In the result, the impugned order is set aside and the appeals are allowed on the ground of limitation, with consequential relief, if any."

6. From the above, it is clear that the position was clarified by the Government by insertion of Explanation only with effect from 1.4.2011 that the trading activity will be Exempted Services. The Explanation is clarificatory in nature and can be held to be applicable even for the past period. Thus, at the relevant period of time, viz., from April 2009 to March 2011, the Assessee was, obviously, under bona fide belief in view of the conflicting decisions of the Tribunals during that period and taking the trading activity as Exempted Services, availed the CENVAT Credit which is sought to be reversed and recovered by the Department invoking the extended period of limitation. Such a bona fide belief cannot be held to be done with ulterior purpose for evading the Duty and therefore, the extended period of limitation would not be available to the Revenue Authority in view of the aforesaid decision rendered by the Hon'ble Supreme Court.

7. The judgments relied upon by the learned counsel for the Revenue viz., Gujarat High Court's decision in CCE v. Neminath Fabrics Pvt. Ltd. as well as decision of a Division Bench of this court in the case of M/s.King Bell Apparels (supra) are not applicable to the facts of the present case as even without attributing any knowledge to the Revenue Authority about such dispute, the fact remains that in view of the Explanation inserted later on in favour of the Assessee for the period prior to 1.4.2011, the Revenue Authority cannot be permitted to reverse such CENVAT Credit and recover the Duty, alleged to have

been evaded by the Assessee, invoking the extended period of limitation under Section 11A of the Act.

8. Therefore, the controversy stands covered by the Supreme Court decision in Kolety Gum Industries case (supra), relied upon by the learned counsel for the Assessee and the present Appeal of Revenue is found to be devoid of any merit and the same is liable to be dismissed. Accordingly, it is dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

The Assistant Commissioner of
GST & Central Excise,
Chennai North Commissionerate,
No.121, Nungambakkam High Road,
Chennai 600 034.

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